

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41499
Docket No. MW-41374
13-3-NRAB-00003-100287

The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference

PARTIES TO DISPUTE: (Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier removed Mr. W. Gooding from service on March 8, 2009 and continued to withhold him from service through July 13, 2009 (System File D-0950U-201/1520129).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant W. Gooding shall now be compensated at the respective and applicable rate of pay for all straight time and overtime hours he was not allowed to work commencing on March 8, 2009 and continuing through July 13, 2009.”

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Organization claims that the Carrier improperly withheld the Claimant from service and refused to return him to work in a prompt manner after being cleared by not only his own physician, but also by a Carrier physician. The Carrier abused its discretion when it subjected the Claimant to numerous repetitive tests. The Organization further asserts that Rule 50 was violated when the Carrier ignored a request for a Medical Board. The Claimant had been cleared by two physicians and the testing conducted by non-physicians kept the Claimant from returning to work. A Medical Board should have resolved the issue.

The Carrier counters that it has the right to withhold an employee from service until medically cleared where there are medical concerns about the employee. The Carrier asserts that there were legitimate medical concerns about the Claimant and there were no arbitrary, capricious, or discriminatory actions undertaken by the Carrier in the handling of the Claimant's medical condition. The Carrier further contends that the Organization failed to demonstrate a violation of Rule 50, and states at Page 9 of its Submission:

“First, Rule 50 is based upon a differing of medical opinions. It states: . . . In this instance, there were no ‘dissenting’ opinions. The Carrier’s Health and Medical Services Department found the documentation provided by the Claimant sufficient to make a determination and after review concurred with the Claimant’s physician that he could return to work.”

The General Chairman’s letter of May 4, 2009, addressed to the Manager of Labor Relations stated, in relevant part:

“We hereby submit to you a claim and a request for a Medical Panel on behalf of Mr. Gooding because the Carrier violated the Agreement, specifically but not restricted to Rules 1, 4, 9, 14, 16, 20, 21, 25, 26, 27, 28, 33, 35, 48 and 50. Commencing on March 8, 2009, the Carrier withheld Mr. Gooding from service without justification or cause.”

The letter detailed the medical findings of the Claimant’s physician, Dr. Lawler and Dr. Martinez, a physician selected by the Carrier to perform a medical

examination of the Claimant. The letter also stated that neither physician found it necessary to withhold the Claimant from work. The Organization contended:

“Should the Carrier disagree with our appraisal of the situation, then it should take steps to impanel a Medical Board to resolve this dispute without delay, in accordance with Rule 50 of our Collective Bargaining Agreement.”

The Carrier denied the claim.

In the General Chairman’s appeal letter of August 25, 2009, he stated in relevant part:

“Initially, we note that there was never any effort by the Carrier to set up a medical panel as referenced in Rule 50. The medical panel has been utilized in the past and in accordance with the Agreement to settle disputes such as the instant case. Indeed, in past claims it was the Carrier’s position that the formation of the medical panel was the only way to determine monetary remedy in such cases. Still the Carrier refuses to participate.”

The Carrier’s response of October 2, 2009, stated in relevant part:

“The Organization presents Rule 50 (e) in support of its claim for compensation. However, Rule 50 does not apply to the case at hand nor does it support the Organization’s claim. Rule 50(a) states:

Disqualification – When an employee is withheld from duty because of his physical or mental condition, the employee or his duly accredited representative may upon presentation of a dissenting opinion, as to the employee’s physical or mental condition by a competent physician, make a written request upon an employing officer for a Medical Review.

First and foremost, it is the Claimant or his duly accredited representative that must initiate the process of a Medical Board. Rule 50 clearly states the employee or representative ‘upon presentation of a dissenting opinion’ of a ‘competent physician . . .

make a written request upon his employing officer for a Medical Board.' The only mention of a Medical Board came in the Organization's May 4, 2009 correspondence, where it stated: 'Should the Carrier disagree with [the Organization's] appraisal of the situation, then it should take steps to impanel a Medical Board to resolve the delay' Again, the Organization or employee must make a written request for a Medical Board and provide a dissenting opinion from a 'competent physician,' which has not been done.

Secondly, a payment to be made under Rule 50(e) is premised on Section (a) of the Rule. Rule 50(a) states:

If it is concluded that the disqualification was improper, the employee will be compensated for actual loss of earnings, if any, resulting from such restrictions or removal from service incident to his disqualification, but not retroactive beyond the date of the request made under Section (a) of the rule.

Again, payment contemplated in Rule 50(e) is based upon the date of a request for a Medical Board. If no request is made, not only is Rule 50(e) not applicable, but there is no date to begin calculation of payment. Therefore, Rule 50(e) does not support the Organization's claim for compensation.”

The Board carefully reviewed the record evidence, which included the Medical Department's "Progress Notes." The Carrier argues that it has the right to withhold an employee from service when there is a legitimate concern about the employee's medical condition and ability to perform the job. The Board does not disagree. However, that right is not unfettered. It must be done in a manner that is not arbitrary, capricious, or discriminatory. Further, Rule 50 provides a mechanism for resolving conflicting medical opinions.

The Carrier asserts that there were no conflicting medical opinions. However, a review of the record evidence indicates that the Claimant's physician Dr. Lawler, as well as Dr. Martinez, the physician selected by the Carrier, found that the Claimant could return to work by mid-March. These opinions are in conflict with the Carrier's position that the Claimant was not able to return to work. Further, the Organization unequivocally requested a Medical Board in the

first sentence of its May 4, 2009 claim. The letter detailed the history of the Claimant's withholding from service as well as the medical opinions. The Carrier did not respond to the request until October.

The Carrier was put on notice of the request for the Medical Board; it was provided a detailed accounting of Dr. Lawler and Dr. Martinez's medical opinions; it had copies of the doctor's correspondence, and was in contact with the doctors as noted in the Carrier's documentation of the Claimant's history during the period he was withheld from service.

The Carrier violated Rule 50 when it ignored the request for a Medical Board. There were dissenting medical opinions from two physicians. The Claimant received a knee brace and later returned to work. As noted by the Organization in its correspondence and Submission, the purpose of a Medical Board is to resolve conflicting medical opinions. A Medical Board could have resolved the medical issues and the Claimant would not have been withheld from service until his return to work in mid-July.

Rule 50 states that there will be no retroactive payment under the Rule prior to the date of the request. Accordingly, the Claimant should be made whole from the date of the claim on May 4, 2009.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 19th day of February 2013.